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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROSENDA FLORES, Defendant and Appellant.	G029729 (Super. Ct. No. 00CF2022) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Daniel J. Didier, Judge. Affirmed.

Jonathan P. Milberg and Amanda F. Doerrer, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela A. Ratner Sobeck and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Rosenda Flores of possession for sale of cocaine. The trial court granted probation on the condition defendant serve one year in the county jail. Defendant challenges the sufficiency of the evidence to support the judgment and claims the court erred by giving jury instructions on the theory of constructive possession and CALJIC No. 17.41.1. We affirm.

I

FACTS

We view the evidence in the light most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) The following summary is based on this standard.

An undercover police officer entered the bar where defendant worked as a bartender. The officer ordered a beer and watched three customers engage in what appeared to be narcotics transactions. One customer handed something to defendant. Defendant placed the "wad" in the waistband of her skirt. The customer exchanged words with defendant, drank a beer, and left the bar.

Approximately one hour after the undercover officer entered the bar, four uniformed officers entered the bar from the rear door. Omar Villegas, who was standing behind the bar with defendant, threw a large wad into a nearby garbage can. According to one officer, Edward Hernandez, defendant shook several white objects from her waistband to the floor. The five bindles of cocaine, weighing a total of 9.5 grams, were found behind the bar where defendant had been standing. Other officers also found a large black plastic bindle of cocaine in the garbage can. Omar Munguia threw something toward the wall. Cipriano Torres threw something on the floor. These bags also contained cocaine. Additional cocaine was found in Torres's pants pocket and car, and in Munguia's car. Officers seized $410 in small denomination bills and a pager from defendant's purse.

Officer Hernandez, the sole officer who saw defendant drop something from her waistband, testified as the narcotics expert. He opined that defendant possessed the five bindles of cocaine for the purpose of sales because of the individual packaging, the amount of cocaine, the street value, the small denomination currency and pager seized from her purse, and because defendant was present in a place where narcotics were sold. He also thought it significant that defendant was not under the influence at the time of her arrest. The bindles were not fingerprinted, even though Hernandez admitted he had done so in other cases.

Defendant testified at trial. She denied possessing or discarding the five bindles found on the floor in her area. She claimed a customer passed her a napkin with his telephone number and the napkin was what the undercover officer saw her put into her waistband. She claimed $300 of the $410 found in her purse was proceeds from the sale of her car to a man named Juan Ramirez. Ramirez testified that he purchased the car for $400 from Isaias Bravo. Bravo purchased the car from defendant for $300. Defendant later admitted she sold her car to Bravo and claimed the release of liability form on file at the Department of Motor Vehicles listing Juan Ramirez as the buyer was completed by someone else.

II

DISCUSSION

Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to prove she possessed cocaine and/or possessed cocaine with the intent to sell. In determining whether substantial evidence exists to support a conviction, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) To set aside the

judgment, for insufficiency of the evidence, "it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict [of the court below]. [Citation.]" (*People v. Grimble* (1981) 116 Cal.App.3d 678, 686.) Furthermore, this court's ability to review the credibility of a witness is highly circumscribed. "If a trier of fact has believed the testimony . . . this court cannot substitute its evaluation of the credibility of the witness unless there is either a physical impossibility that the testimony is true or that the falsity is apparent without resorting to inferences or deductions. [Citations.]" (*People v. Swanson* (1962) 204 Cal.App.2d 169, 173.) "Under this standard, the court does not "'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Defendant challenges Hernandez's credibility by arguing he could not have seen her drop five bindles of cocaine from her waistband because her lower body was obscured by the bar. Hernandez admitted a portion of defendant's body was concealed by the bar, but claimed he could see the lower part of her body through an employee opening in the bar. Nothing in the record contradicts this testimony and the record supports Hernandez's testimony in significant ways. Another officer saw a bar patron hand defendant something she placed in her waistband, yet no item other than the five bindles were discovered. Villegas was seen to throw something into a garbage can, not on the floor. Defendant and Villegas were alone behind the bar. This suggests defendant possessed the items found on the floor. The jury believed Hernandez's testimony and the evidence is sufficient to support their conclusion defendant possessed the five bindles of cocaine found behind the bar.

We also reject defendant's related argument that insufficient evidence supports her conviction for possession of cocaine for the purpose of sales. Specifically,

defendant argues, "the facts and reasoning upon which [Hernandez's expert] opinion was based do not support the officer's conclusion." However, defendant's true contention is that the jury could have viewed the evidence in a light more favorable to her. While true, this is not an argument for a reviewing court. The rules of appellate review prevent this court from reweighing the evidence and coming to a different conclusion absent factual impossibility. Hernandez's expert opinion, and the facts upon which his opinion is based, are sufficient to support a conviction of possession of cocaine for sales.

Purported instructional error

Defendant contends the court erred by giving instructions on actual and constructive possession. Defense counsel did not object to the standard instructions on possession and possession for sale of a controlled substance, which include a definition of actual and constructive possession, nor did counsel request a modification of either standard instruction. Generally, such failure to object constitutes a waiver of the issue on appeal. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) But even assuming the issue was preserved for appeal, or is reviewable as a violation of defendant's "substantial constitutional rights," we find no prejudice.

CALJIC Nos. 12.00 and 12.01 provide, in pertinent part, "There are two kinds of possession: actual possession and constructive possession." The instructions also define each theory of possession. The prosecutor argued defendant actually possessed the cocaine and did not rely upon the theory defendant constructively possessed the cocaine. Thus, the references in the two instructions to constructive possession could have been eliminated. However, "'In determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine "what a reasonable juror could have understood the charge as meaning." [Citation.] While the initial focus is on the specific instruction challenged [citation], we must also review the instructions as a whole to see if the entire charge delivered a correct

interpretation of law. [Citation.]' [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 446.)

Defendant does not contend the instructions were incorrect, only that a portion of the instructions was surplusage. However, defendant fails to demonstrate she suffered prejudice as a result of the instructions as given. Had the prosecutor relied on the alternative theory, defendant would have no cause to complain. The facts supported giving instructions on actual and constructive possession. The fact the jury believed Hernandez and determined defendant actually possessed cocaine does not mean the court erred in giving instructions on constructive possession. And, there is no evidence the jury was mislead or confused by the instructions.

The trial court also instructed the jury with CALJIC No. 17.41.1 as follows: "The integrity of a trial requires that jurors at all times, during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Defendant contends CALJIC No. 17.41.1 violates multiple state and federal constitutional provisions and impaired the jury's ability to properly deliberate. She contends the error is "structural" and requires reversal per se. We disagree.

The issue of the constitutionality of CALJIC No. 17.41.1 was decided by the California Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436. The court concluded that CALJIC No. 17.41.1 "does not infringe upon [a] defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict . . . ." (*Id.* at pp. 439-440.) Nevertheless, the high court also held that "CALJIC No. 17.41.1 should not be given in the future. The law does not require that the jury be instructed in these terms, and the instruction, by specifying at the outset of deliberations that a juror has the obligation to police the reasoning and decision making of other jurors,

creates a risk of unnecessary intrusion on the deliberative process." (*Id.* at p. 441.) Nevertheless, the error is not reversible per se. (*People v. Molina* (2000) 82 Cal.App.4th 1329, 1332.)

Defendant acknowledges *Molina*, but urges that it was wrongly decided. We disagree. Because defendant makes no attempt to show she was prejudiced by the instruction, she may be deemed to have waived the argument. But even assuming no waiver, we conclude defendant was not prejudiced by CALJIC No. 17.41.1. The record here does not show there was any holdout juror, jury deadlock, or problem in deliberations. The jury began deliberating at 2:15 p.m. on July 31, 2001, and reached its verdict by 11:20 a.m. the following day. The only question the jury sent the court did not pertain to any matters arguably related to CALJIC No. 17.41.1. There is no indication that CALJIC No. 17.41.1 had any impact prejudicing defendant, and we will not speculate that it did.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P.J.

O'LEARY, J.